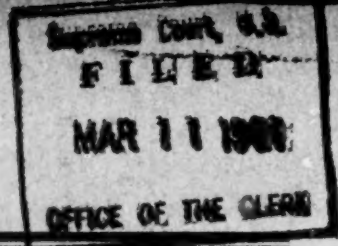


(2)
No. 90-1072



In the Supreme Court of the United States

OCTOBER TERM, 1990

ALFRED E. RAMEY, PETITIONER

v.

UNITED STATES GENERAL ACCOUNTING OFFICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether employees of the GAO were entitled to absolute immunity from common-law tort claims arising from adverse personnel actions against petitioner.

2. Whether the district court's finding that the GAO did not discriminate against petitioner on the basis of his sex was clearly erroneous.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-11c) is reported at 915 F.2d 731. The opinions of the district court (Pet. App. 1a-9b) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1990. The petition for a writ of certiorari was filed on January 3, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioner, who was then a GS-13 computer specialist with the General Accounting Office, competed with eight other applicants for a promotion to a GS-14 posi-

tion. When respondent Kearns awarded the position to a female employee, petitioner filed an administrative complaint alleging that the decision was the result of sex discrimination. Thereafter, petitioner was denied a within-grade increase, and he amended his administrative complaint to allege retaliation and reprisal. Pet. App. 2c-3c.

The GAO Personnel Appeals Board determined that petitioner's nonselection for the GS-14 position did not result from sex discrimination, but also held that the denial of petitioner's within-grade increase resulted "at least in part" from petitioner's filing of the discrimination claim. Accordingly, the Appeals Board awarded petitioner the within-grade increase that had been withheld. Pet. App. 3c; see *id.* at 1e-4e.

Not satisfied with this relief, petitioner filed the instant action in district court against respondents GAO and Kearns. His complaint alleged that the GAO had discriminated against him on the basis of his sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and that Kearns had committed various common-law torts, including libel, slander, civil fraud and conspiracy. In 1983, while the suit was pending, the GAO denied petitioner a within-grade salary increase and terminated his employment. Petitioner amended his complaint to bring common-law tort claims against the other individual respondents, all GAO employees. In 1986, the Personnel Appeals Board of the GAO ruled that the adverse actions taken against petitioner in 1983 were in reprisal for his protected EEO activities. Accordingly, the Board ordered petitioner reinstated with backpay. Pet. App. 3c, 1d-7d, 43d-44d.

2. In the meantime, in this case, the district court granted pretrial motions to dismiss petitioner's common-law tort claims against the individual respondents. Pet. App. 3c-4c; see *id.* at 1a-6a. The district court held that those

respondents were absolutely immune from all such claims. *Ibid.*

Petitioner's Title VII claim against the GAO proceeded to trial. At the close of the evidence, the court dismissed the action. The court found that petitioner's expert, on whose testimony petitioner was relying to prove discrimination in the promotion of the female applicant instead of petitioner, had been "thoroughly discredited" and that "there [was] simply no credible evidence * * * of gender playing any part in this employment decision." Pet. App. 7b, 9b; see *id.* at 4c.

3. The court of appeals affirmed. Pet. App. 1c-11c. With respect to the individual respondents, the court held that "each supervisor was entitled to assert his official immunity as an absolute bar to [petitioner's] tort claims." *Id.* at 4c. The court applied the two-part test set forth by this Court in *Westfall v. Erwin*, 484 U.S. 292, 300 (1988), under which employees are absolutely immune from state-law tort liability if "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." The court of appeals concluded that "it cannot seriously be disputed that [the individual respondents] acted within the scope of their official duties" and further ruled that the allegedly tortious conduct was " 'the product of independent judgment,' and the 'exercise [of] decisionmaking discretion,' of the sort described * * * in *Westfall*." *Id.* at 5c-6c.

Regarding petitioner's Title VII claim against the GAO, the court found "no error in the District Court's judgment that Ramey was not a victim of sex discrimination," noting that this determination was subject to review only under the clearly erroneous standard. Pet. App. 7c (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982);

Anderson v. City of Bessemer City, 470 U.S. 564, 573-575 (1985)).¹

ARGUMENT

1. Under *Westfall v. Erwin*, 484 U.S. at 300, federal employees are absolutely immune from state-law tort liability if “the challenged conduct is within the outer perimeter of an official’s duties and is discretionary in nature.” Petitioner contends that the tortious acts alleged in his complaint were unlawful and “therefore *cannot be* legally cognizable as within the ‘outer perimeter’ of official duties.” Pet. 32.

As the court of appeals recognized, acceptance of that contention would effectively abolish official immunity. “No government officer, of course, can be ‘authorized’ to act unlawfully. But if the scope of an official’s authority or line of duty were viewed as coextensive with the official’s lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity would be ‘completely abrogate[d].’” Pet. App. 6c. The court of appeals noted — and the petition does not dispute — that “[t]he alleged torts committed by the supervisors arose out of their evaluation of [petitioner’s] work performance, their hiring and firing decisions, and their testimony at the administrative adjudicatory proceedings.” *Id.* at 5c. On their face, those actions were within the outer perimeter of the supervisors’ responsibilities; the fact that petitioner has alleged that those acts were tortious under state law does not deprive the supervisors of their entitlement to immunity.²

¹ The court of appeals also rejected petitioner’s claims concerning alleged errors in the trial proceedings. Pet. App. 10c-11c. The petition does not seek further review of those questions.

² Petitioner repeatedly suggests that the individual respondents are collaterally estopped by the decision of the GAO’s Personnel Appeals

The enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Reform Act), Pub. L. No. 100-694, 102 Stat. 4563-4567, does not undermine the individual respondents' entitlement to immunity or otherwise enhance petitioner's claims. The purpose of that statute is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment." Reform Act, § 2(b). To that end, Section 5 of the Reform Act, 28 U.S.C. 2679(b)(1), provides that the remedy against the United States conferred by the Federal Tort Claims Act for personal injury or property damage resulting from torts committed by federal employees acting within the scope of their employment is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employees whose act or omission gave rise to the claim." If the Attorney General or a court certifies that an employee named as a defendant was acting within the scope of his or her employment at the time of the incident out of which the claim arose, the United States is substituted as the de-

Board from claiming that they were acting within the scope of their authority with respect to the matters involved in this action. There is no merit to that contention. First, the individual respondents were not parties in the administrative proceeding and thus could not be bound by any findings the Board made. Second, the Board had no occasion to consider whether those respondents had acted beyond the outer perimeter of their duties, whether their actions were tortious, or whether petitioner was thereby entitled to any relief beyond that awarded by the Board. The only issue before the Board was whether particular personnel actions—the 1983 denial of a within-grade salary increase and petitioner's subsequent termination—should be sustained. Assuming for purposes of argument that the Board's unappealed ruling on that question would be entitled to collateral estoppel effect, it would not bar a determination, in petitioner's district court suit, that the individual respondents were acting within the outer perimeter of their official duties.

fendant and the case proceeds as though it had been commenced against the United States under the FTCA.³ Section 6 of the Reform Act, 28 U.S.C. 2679(d).

The Act exempts two categories of claims — actions based upon a violation of the Constitution and actions based upon a violation of a federal statute — from its otherwise unqualified prohibition on actions against federal employees sued for torts committed within the scope of their employment. Section 5 of the Reform Act, 28 U.S.C. 2679(b)(2). Actions encompassed by those exceptions may be brought and pursued against individual federal employees to the extent permitted by otherwise applicable law, but they remain subject to any available defense of official immunity. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

Significantly, the Reform Act has no effect on the scope or effect of the immunities that may be asserted in actions against federal employees. Moreover, the Reform Act’s exceptions for actions based upon a violation of the Constitution or a federal statute are irrelevant to petitioner’s claims. Petitioner’s complaint does not assert federal statutory or constitutional claims against the individual respondents; in any event, the effect of those exceptions is merely to permit suits against federal employees under otherwise applicable law, not to alter the scope of the immunity available in any such suit.⁴ Those exceptions thus lend no support

³ The Reform Act was not enacted until after the individual respondents had been dismissed from the action and the case was pending on appeal. Accordingly, no certification under the Reform Act was issued or sought.

⁴ It is of course well settled that a Title VII action against the appropriate federal agency “provides the exclusive judicial remedy for

to petitioner's assertion that an act or omission that violates state tort law is necessarily beyond the scope of a federal employee's employment.⁵

2. Petitioner argues that the district court's finding that the GAO did not discriminate against him on the basis of his sex was clearly erroneous. Pet. 34-36. For the reasons set forth in detail in the court of appeals' opinion (Pet. App. 7c-10c), the record amply supports the district court's determination that petitioner was not the victim of sex discrimination. It has long been this Court's practice, absent extraordinary circumstances, not to disturb concurrent factual

claims of discrimination in federal employment." *Brown v. GSA*, 425 U.S. 820, 835 (1976). Thus, the individual respondents' alleged violations of Title VII cannot give rise to a damages claim against them in their individual capacities.

⁵ All of petitioner's state-law claims against the individual respondents would be foreclosed, if the United States were substituted as the defendant in this case, by exceptions to the Federal Tort Claims Act. See 28 U.S.C. 2680(a) (barring claims arising out of "discretionary function[s]"); 28 U.S.C. 2680(h) (barring, *inter alia*, claims for libel, slander and misrepresentation). This Court granted certiorari in *United States v. Smith*, No. 89-1646 (June 11, 1990), to determine whether the Reform Act applies (as we argue on behalf of petitioners that it does) to common-law tort claims that may not be pursued against the United States by virtue of FTCA exceptions. Petitioner would derive no benefit from a decision in favor of the respondents in *Smith*. In *Smith*, the respondents contend that they should be permitted to pursue an action against an individual federal employee, rather than being limited to an action against the United States which would be barred. Here, petitioner commenced an action against federal employees, and the court of appeals held that petitioner's claims against those employees are barred. Of course, if the government were to prevail in *Smith*, the Court's ruling would provide an additional ground for dismissal of the claims commenced against the individual respondents; upon a certification that the individual respondents were acting within the scope of their employment, the United States would be substituted as the defendant and the case would be subject to dismissal under exceptions to the FTCA.

findings by an appellate and a trial court. See, *e.g.*, *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-318 n.5 (1985); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). There is no reason for the Court to depart from that practice in the instant case. Petitioner's challenge to the district court's assessment of the evidence presents no question warranting this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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